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In The

Supreme Court of the United States

ROCIO SANCHEZ; OLGA CASTRO; MYRNA MARTINEZ; KAREN BJORLAND; CHERYL MACLYMAN and RHONDA KERN On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

vs.

COUNTY OF SAN DIEGO; SAN DIEGO COUNTY BOARD OF SUPERVISORS; SAN DIEGO COUNTY DEPARTMENT OF HEALTH AND HUMAN SERVICES; JEAN SHEPARD, Director Of The San Diego County Health And Human Services Agency, in her official capacity; SAN DIEGO OFFICE OF DISTRICT ATTORNEY; BONNIE DUMANIS, District Attorney Of The County Of San Diego, in her official capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the County of San Diego's home visit program violates the Fourth Amendment where applicants are free to refuse entry into their homes, and the purpose of the home visit is to confirm eligibility for welfare benefits, not to locate evidence of criminal conduct?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
INTRODUCTION/SUMMARY OF ARGUMENT	1
STATEMENT OF THE CASE	4
A. Proceedings Below	9
B. Proceedings In This Court	10
ARGUMENT	11
I THE NINTH CIRCUIT'S DETERMINATION THAT THE HOME VISITS DO NOT VIOLATE THE FOURTH AMENDMENT IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DECISIONS FROM THE OTHER COURTS OF APPEALS	11
A. There Is No Conflict Among The Courts of Appeal	16
B. Searches Made For Purposes Of Investigating Child Abuse Are Different From The Project 100% Home Visits	20
C. The Status Of *Wyman's* Initial Holding Does Not Warrant Consideration By This Court	23
II THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THIS CASE IS GOVERNED BY *WYMAN*	25

TABLE OF CONTENTS – Continued

Page

A. The Purpose Of The Home Visits Is To Confirm Benefit Eligibility 26

B. The Home Visits Are Not Coerced 28

C. The Investigators Are Not Police Or Uniformed Authority 28

D. Rehabilitation Was Not The Primary Purpose Of The Home Visits In *Wyman* 30

E. The Home Visits Are Needed To Confirm Benefit Eligibility 33

F. No Serious Welfare Fraud Problem Is Necessary For The Existence Of A Home Visits Program 34

G. The Ninth Circuit Did Not Endorse A Home Visit Program For Taxpayers 36

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

Board Of Education v. Earls, 536 U.S. 822 (2002) 34

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999) ... 21, 22

Camara v. Municipal Court, 387 U.S. 523 (1967) 17

Good v. Dauphin County Social Services, 891 F.2d 1087 (3d Cir. 1989) 21

Griffin v. Wisconsin, 483 U.S. 868 (1987)..... 15, 24

Hubbard v. United States, 514 U.S. 695 (1995)..... 17

James v. Goldberg, 303 F. Supp. 935 (1969) 31

Lenz v. Winburn, 51 F.3d 1540 (11th Cir. 1995)..... 21

McCabe v. Life-Line Ambulance Serv., 77 F.3d 540 (1st Cir. 1996) 24

New York v. Burger, 482 U.S. 691 (1987) 29

Reyes v. Edmunds, 472 F. Supp. 1218 (D. Minn. 1979)..... 16, 17

Roe v. Texas Department of Protective and Regulatory Services, 299 F.3d 395 (9th Cir. 2002)..... 21

Roska v. Peterson, 328 F.3d 1230 (10th Cir. 2003)..... 21

S.L. v. Whitburn, 67 F.3d 1299 (7th Cir. 1995).... *passim*

Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006)..... 9, 20, 27, 32, 36

TABLE OF AUTHORITIES – Continued

Page

Sanchez v. County of San Diego, 483 F.3d 965 (9th Cir. 2007) 10

See v. Seattle, 387 U.S. 541 (1967) 17

Wildauer v. Rederick County, 993 F.2d 369 (4th Cir. 1993) 21

Wyman v. James, 400 U.S. 309 (1971) ..... *passim*

RULES AND STATUTES

42 U.S.C. § 601 et seq. 4

42 U.S.C. § 603 4

Cal. Welf. & Inst. Code § 10100 4

Cal. Welf. & Inst. Code § 10802 4

Cal. Welf. & Inst. Code § 11200 et seq. 4

Cal. Welf. & Inst. Code § 11209 4

Cal. Welf. & Inst. Code § 11250 et seq. 4

Cal. Welf. & Inst. Code § 11320 et seq. 4

Cal. Welf. & Inst. Code § 11454 4

U.S. Const, amend. IV ..... *passim*

U.S. Supreme Court Rule 10 25

BRIEF IN OPPOSITION

Respondents County of San Diego; San Diego County Board of Supervisors; San Diego County Department of Health and Human Services; Jean Sheppard, Director of the San Diego County Health and Human Services Agency, in her official capacity; San Diego Office of District Attorney; and Bonnie Dumanis, District Attorney of the County of San Diego, in her official capacity (collectively the "County") respectfully submit this opposition to the Petition for a Writ of Certiorari filed by petitioners Rocio Sanchez, Olga Castro, Myrna Martinez, Karen Bjorland, Cheryl Maclyman, and Rhonda Kern.

INTRODUCTION/SUMMARY OF ARGUMENT

This case involves a challenge to a program adopted by the County of San Diego (the "County") requiring its employees to confirm through a home visit that all applicants for CalWORKs benefits (commonly known as welfare) are eligible for those benefits. The name of this program is "Project 100%."

Petitioners' Fourth Amendment challenge to the County's home visit program was correctly rejected by the district court and the Ninth Circuit. Petitioners urge the Court to grant the Petition because they contend that the Ninth Circuit's decision in this case conflicts with the Seventh Circuit's decision in *S.L. v. Whitburn*, 67 F.3d 1299 (7th Cir. 1995), examining a similar home visit program. However, those decisions

do not conflict at all. In both cases, relying on this Court's decision in *Wyman v. James*, 400 U.S. 309 (1971), the courts of appeals held that the home visits were not searches governed by the Fourth Amendment and that even if they were searches they were reasonable. In addition, the courts of appeal applied this Court's "special needs" cases in confirming that no search warrant was necessary. Despite petitioners' assertion to the contrary, the Seventh Circuit did not conclude, in direct contravention of *Wyman*, that the home visits would have violated the Fourth Amendment if they had been a condition of receiving welfare benefits.

Recognizing that (a) only two courts of appeals decisions have applied *Wyman* to home visit programs used to confirm eligibility for welfare benefits in the past thirty-six years and (b) that the two courts of appeals decisions are consistent, petitioners try to create a conflict by lumping all "home entries by government officials in the social-services context" together. This approach is unavailing. The cases cited by petitioners involve highly individualized investigations of child abuse. The courts of appeals have had no trouble distinguishing between systematic home visits for the purpose of confirming eligibility for welfare benefits and home entries made based on individualized suspicion of child abuse.

Next, petitioners urge the Court to grant certiorari because the *Wyman* court's initial holding that the home visits are not searches within the meaning of the Fourth Amendment is purportedly inconsistent

with later decisions from the Court addressing other administrative "searches." This is hardly a pressing issue that needs this Court's attention because only two courts of appeals decisions in the past thirty-six years have considered whether home visits used to confirm eligibility for welfare benefits are searches within the meaning of the Fourth Amendment. Moreover, in each of those cases the courts of appeals went on to consider whether the searches were reasonable, assuming that they were Fourth Amendment searches. In performing this analysis, the courts of appeals also considered this Court's subsequent "special needs" cases. Thus, there is almost no chance that a lower court will reach a conclusion that is inconsistent with *Wyman* or the Court's other Fourth Amendment cases.

Finally, the Ninth Circuit's determination that the County's home visits do not violate the Fourth Amendment is consistent with this Court's decision in *Wyman*. Petitioner's effort to distinguish the facts of this case from the home visits at issue in *Wyman* is not persuasive. The Ninth Circuit properly rejected petitioners' contentions.

STATEMENT OF THE CASE

San Diego County residents who apply for CalWORKs[1] benefits and who are not suspected of being ineligible for those benefits automatically participate in Project 100%.[2] (ER 81 Ex. 2 at 1, ¶ 6 (Agreement), Ex. 4 at 1, ¶ 3 (Program Summary)).[3] All participants

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[1] In 1996, Congress passed landmark welfare reform legislation in the form of the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996." This legislation replaced the Aid to Families with Dependent Children program ("AFDC") with the Temporary Assistance for Needy Families program ("TANF") and provided assistance to transition individuals from welfare to work. 42 U.S.C. § 601 et seq.

As required by the federal legislation, California adopted the Welfare to Work Act of 1997 and established CalWORKs (California Work Opportunity and Responsibility to Kids). Cal. Welf. & Inst. Code § 11200 et seq. CalWORKs has two components. One component provides cash assistance to needy California families. *Id.* at § 11250 et seq. This cash assistance is provided for a lifetime maximum of five years. *Id.* at § 11454. The other component provides assistance to help recipients transition from welfare to work. *Id.* at § 11320 et seq. Only the cash assistance component of CalWORKs is at issue in this lawsuit.

San Diego County and the other fifty-seven counties in California are responsible for administering the CalWORKs program in conformity with federal and state laws and regulations. *Id.* at §§ 10802, 11209. Federal, state and county governments jointly provide funding for CalWORKs. *Id.* at § 10100 et seq.; 42 U.S.C. § 603.

[2] If the County has some reason to suspect that the applicant is ineligible for benefits, the applicant does not participate in Project 100%. (ER 81 Ex. 4 at 1, ¶ 3 (Program Summary)).

[3] "ER" refers to the Excerpts of Record filed in the Ninth Circuit.

in Project 100% receive a home visit so that the County can confirm their eligibility for benefits. (ER 81 Ex. 4 at 1, ¶ 1 (Program Summary)). The home visit has two primary components – an interview followed by a "walk through" of the applicant's residence. (ER 85 Ex. 14 at 44:7-18 (Reid Depo.); ER 81 Ex. 7 (Program Summary)).

The purpose of the home visit is to view items confirming that: (1) the applicant has the amount of assets claimed; (2) the applicant has an eligible dependent child; (3) the applicant lives in California; and (4) an "absent" parent does not live in the residence. (ER 81 Ex. 8 (Eligibility Factors)).

The home visits are conducted by Public Assistance Investigators ("investigators") employed by the San Diego County District Attorney's Office ("D.A.'s Office"). (ER 81 Ex. 9 at 1 (Program Summary)). The investigators are not prosecutors or police. They do not carry weapons of any kind, do not wear uniforms, and have no authority to arrest individuals. (ER 81 Ex. 10 at 1 (memo), Ex. 10 at 15:12-15 (Crosby Depo.), Ex. 10 at 58:17-19 (Bogard Depo.); ER 79 at 2, ¶ 6 (Crosby Decl.)). Generally, only one investigator makes the home visit. (ER 79 at 1, ¶ 2 (Crosby Decl.)).

Applicants are informed in advance that an investigator will come to their residence to confirm their eligibility for CalWORKs benefits. A one-page notice of the home visit is contained in the CalWORKs application. (ER 81 Ex. 11 (Notice)). Eligibility technicians ("ETs") also tell the applicants that an

investigator will be coming to their residence. (ER 81 Ex. 12 at 111:10-20 (Deguzman Depo.)).

The home visits are generally conducted within ten days of the applicant's initial interview with the County's Health and Human Services Agency ("HHSA"). (ER 81 Ex. 13 at 104:11-16 (Crosby Decl.), Ex. 13 at 36:3-6 (Reid Depo.)). However, if the applicant is not at home on the day of the visit, the investigator will leave his or her business card with a note asking the applicant to call the investigator. (ER 81 Ex. 4 at 1, ¶ 6 (Program Summary), Ex. 14 at 46:19-47:12 (Crosby Depo.), Ex. 14 at 73:10-21 (Gonzalez Depo.)). When the applicant calls, an appointment will be scheduled for the home visit. (ER 81 Ex. 15 at 56:17-57:3 (Bogard Depo.)). If the applicant is not at home at the scheduled time of the appointment, the investigator will leave another business card asking the applicant to call. (ER 81 Ex. 4 at 1, ¶ 6 (Program Summary), Ex. 16 at 75:23-76:4 (Duvall Depo.)). If after several days the applicant has not called, the investigator will report this information to the responsible ET and the application will be denied.[4] (ER 81 Ex. 4 at 1, ¶¶ 6, 8 (Program Summary)).

The home visits are made during regular business hours (usually between 8 a.m. and 5 p.m.),

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[4] Some investigators may attempt more than two home visits before reporting to the ET that no home visit could be made because of the applicant's unavailability. (ER 81 Ex. 17 at 62:21-64:17 (Reid Depo.)).

unless a different time is required to accommodate an applicant's schedule. (ER 81 Ex. 19 at 72:14-73:5 (Gonzalez Depo.)). The investigators are trained to be professional, courteous and respectful to the applicant during the home visit. (ER 81 Ex. 20 at 1, ¶ B (Training Manual), Ex. 20 at 88:19-89:24 (Gonzalez Depo.)). When an investigator arrives at an applicant's residence for the home visit, she identifies herself and asks the applicant whether she is willing to answer some questions. (ER 81 Ex. 21 at 1, ¶ II (Program Manual), Ex. 21 at 46:15-20, 47:16-22 (Duvall Depo.)). If the applicant says no, the home visit terminates and the investigator leaves. (ER 79 at 2, ¶ 5 (Crosby Decl.)). The interview may be conducted outside the applicant's residence or inside the residence if the applicant invites the investigator inside. (ER 81 Ex. 23 at 39:1-21 (Reid Depo.), Ex. 23 at 40:22-41:6 (Crosby Depo.)). If the interview is conducted outside the residence, the investigator will ask the applicant's permission to enter the residence. If permission is denied, the investigator leaves and terminates the home visit. (ER 81 Ex. 24 at 41:7-10 (Crosby Depo.), Ex. 24 at 65:25-66:11 (Gonzalez Depo.)).

Once inside, the investigator will ask the applicant to lead a walk through of the residence. (ER 81 Ex. 25 at 1, ¶ B (Program Guide), Ex. 25 at 1 (Training Bulletin), Ex. 25). Often the walk through occurs as a result of the investigator's request to be shown specific items such as clothes belonging to the applicant. (ER 81 Ex. 26 at 55:5-22 (Reid Depo.)). The

investigator will not walk through the residence unless escorted by the applicant. (ER 81 Ex. 27 at 1 (Training Bulletin), Ex. 27 at 69:1-10 (Bogard Depo.)). If the investigator wants to look at any objects not in plain view, she will ask the applicant to open a closet, medicine cabinet, dresser drawer, etc. (ER 81 Ex. 28 at 1 (Training Bulletin), Ex. 28 at 80:10-19 (Gonzalez Depo.), Ex. 28 at 54:6-15 (Duvall Depo.), Ex. 28 at 70:3-10 (Bogard Depo.)). If the applicant refuses, the investigator will not view objects outside plain view. (ER 81 Ex. 29 at 57:19-21 (Duvall Depo.)). The walk through generally takes five to ten minutes. (ER 85 Ex. 7 at 74:12-18 (Duvall Depo.)). Once the investigator completes a home visit, she transmits her findings electronically to the ET assigned to the applicant's file. (ER 81 Ex. 37 at 23:20-25 (Gonzalez Depo.)). The ETs are employed by HHSA. (ER 81 Ex. 38 at 75:23-25; ER 79 at 2, ¶ 7 (Crosby Decl.)). The ETs, and not the investigators, decide whether to approve CalWORKs benefit applications. (ER 81 Ex. 39 at 65:4-10 (Gonzalez Depo.), Ex. 39 at 31:9-11(Bogard Depo.); ER 79 at 2, ¶ 7 (Crosby Decl.)).

If an applicant refuses to allow a home visit, the applicant is not criminally prosecuted. (ER 79 at 2, ¶ 5 (Crosby Decl.)). Indeed, refusal to allow a home visit will not result in any criminal or civil penalty. The only consequence of refusing to allow a home visit is that the application for CalWORKs benefits will be denied. (ER 81 Ex. 40 at 38:13-39:16 (Crosby Depo.)). No applicant has been prosecuted for welfare fraud based upon anything observed or discovered

during a home visit that contradicted information provided by the applicant. (ER 81 Ex. 43 at 89:4-10, 157:1-4, 177:12-25, 191:20-192:6).

A. Proceedings Below.

On March 10, 2003, the district court ruled on the parties cross-motions for summary judgment. (ER 138). The district court granted summary judgment in favor of the County on petitioners' Fourth Amendment claim. Based on *Wyman*, the district court concluded that the home visits are not searches within the meaning of the Fourth Amendment. (*Id.* at 6). Further, the district court concluded that even if the home visits were searches, they are reasonable under this Court's holding in *Wyman* and this Court's subsequent "special needs" cases. (*Id.* at 6-13). Judgment was entered in favor of the County on the Fourth Amendment claim on January 5, 2004. (ER 162).[5]

The Ninth Circuit affirmed the district court's decision. In a 2-1 opinion written by Judge A. Wallace Tashima (joined by Judge Andrew J. Kleinfeld), the Ninth Circuit concluded that the home visits do not violate the Fourth Amendment. *Sanchez v. County of San Diego*, 464 F.3d 916 (9th Cir. 2006). The Ninth Circuit found that under this Court's holding in *Wyman*, the home visits are not searches within the

[5] The County omits discussion of petitioners' claims that are not at issue in this Petition for a Writ of Certiorari.

meaning of the Fourth Amendment. The Ninth Circuit also concluded that even if the home visits were searches they were reasonable and did not violate the Fourth Amendment. Finally, the court concluded that there was a special need for the home visits unrelated to law enforcement and therefore under this Court's "special needs" cases no warrant is needed to conduct the home visits. Judge Raymond C. Fisher filed a dissenting opinion.

The petitioners subsequently filed a Petition for Rehearing *En Banc* with the Ninth Circuit. The Ninth Circuit denied that Petition. *Sanchez v. County of San Diego*, 483 F.3d 965 (9th Cir. 2007). Judge Harry Pregerson filed a dissenting opinion that was joined by judges Stephen Reinhardt, Kim McLane Wardlaw, William A. Fletcher, Raymond C. Fisher, Richard A. Paez and Marsha S. Berzon. Judge Alex Kozinski wrote a separate one sentence dissent. Thus, eight of the Ninth Circuit's twenty-eight active judges dissented from the denial of rehearing *en banc*.

B. Proceedings In This Court.

Petitioners filed a Petition for a Writ of Certiorari in this Court on August 15, 2007. The Petition was placed on the docket August 17, 2007. On August 29, 2007, the Court granted the County a thirty-day extension of time to file this Opposition to the Petition for a Writ of Certiorari.

ARGUMENT

I

THE NINTH CIRCUIT'S DETERMINATION THAT THE HOME VISITS DO NOT VIOLATE THE FOURTH AMENDMENT IS CONSISTENT WITH THIS COURT'S PRECEDENTS AND DECISIONS FROM THE OTHER COURTS OF APPEALS

In finding that the County's home visits do not violate the Fourth Amendment, the Ninth Circuit primarily – but not exclusively – relied on this Court's 1971 decision upholding similar home visits in *Wyman*. In *Wyman*, the Court held that the home visits did not implicate the Fourth Amendment because the home visits were not searches. Alternatively, the Court held that even if the visits were Fourth Amendment searches, they were reasonable and therefore did not violate the Constitution.

Under the New York laws and regulations at issue in *Wyman*, ***all*** applicants for welfare benefits were required to have an initial home visit. 400 U.S. at 312 n.4. In addition, New York required that home visits be made every three months to confirm that the recipient remained eligible for welfare benefits. *Id.* at 312 n.3. The plaintiff in *Wyman* (Mrs. James) initially applied for welfare benefits and received a home visit from a caseworker employed by the New York City Department of Social Services. Mrs. James did not object to that home visit and began receiving benefits. Two years later, New York City informed Mrs. James

that a caseworker would need to make another visit to her home. Mrs. James indicated that she would not allow a home visit and the caseworker responded that if she did not do so her benefits would be terminated. Mrs. James subsequently challenged the home visit requirement in an administrative proceeding. Her challenge was denied and her benefits were terminated.

Mrs. James filed a federal lawsuit alleging, among other things, that the home visits violated her Fourth Amendment right to be free from unreasonable searches and seizures. This Court rejected Mrs. James' challenge to New York City's home visit program.

First, the Court held that the home visit did not rise to the level of a "search" within the meaning of the Fourth Amendment. The Court reasoned as follows:

> [W]e are not concerned here with any search by the New York social service agency in the Fourth Amendment meaning of that term. It is true that the governing statute and regulations appear to make mandatory the initial home visit and the subsequent periodic "contacts" (which may include home visits) for the inception and continuance of aid. ***It is also true that the caseworker's posture in the home visit is perhaps, in a sense,***

> ***both rehabilitative[6] and investigative. But this latter aspect, we think, is given too broad a character and far more emphasis than it deserves if it is equated with a search in the traditional criminal law context.*** We note, too, that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

Id. at 317-18 (emphasis added).

Second, the Court also held that even if the home visits were Fourth Amendment searches, they were reasonable. The Court based its holding upon the following factors: (1) by observing the child in the home, New York could assure that the child's best interests were being served; (2) New York had a "paramount interest and concern . . . in assuring" that the taxpayers money was being spent only on those who were eligible to receive welfare benefits; (3) the taxpaying public has an interest in knowing how its funds are being put to work and assuring that that they are being used properly; (4) home visits, while

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[6] "Rehabilitative" apparently refers to the fact that the New York Social Services law stated that the home visits were made, in part, "in order that any treatment or service tending to restore such persons to a condition of self-support and to relieve their distress may be rendered. . . ." *Id.* at 311 n.2.

not required by federal or state law, are an accepted practice in other jurisdictions; (5) the home visits are not done by forcible entry, under false pretenses, outside normal business hours and do not involve "snooping"; (6) not "all information pertinent" to eligibility could be obtained by an interview outside the house or by "examining a lease or a birth certificate, or by periodic medical examinations, or by interviews with school personnel"; (7) the home visits are not done by the "police or uniformed authority" and do not "deal with crime or the actual or suspected perpetrators of crime"; (8) the home visit "is not a criminal investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding";[7] and (9) requiring New York to obtain a warrant to make the home visit "is not without its seriously objectionable features in the welfare context," i.e., a warrant would justify entry by force, at virtually any hour, would imply criminal or noncompliant behavior, etc. *Id.* at 318-24.

The Court's determination that if the home visit was a search under the Fourth Amendment, the

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[7] The Court noted that "[i]f the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect." *Id.* at 323. Further, the Court stressed that "[i]f the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." *Id.* (footnote omitted).

search was reasonable and no warrant was needed is perfectly consistent with this Court's subsequent "special needs" cases. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) ("Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have permitted exceptions when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.") (citations and internal quotation marks omitted). Indeed, the Court discussed in detail why requiring a government entity to obtain a warrant for a welfare home visit would be impractical:

> The warrant procedure, which the plaintiff appears to claim to be so precious to her, even if civil in nature, is not without its seriously objectionable features in the welfare context. If a warrant could be obtained (the plaintiff affords us little help as to how it would be obtained), it presumably could be applied for ex parte, its execution would require no notice, it would justify entry by force, and its hours for execution would not be so limited as those prescribed for home visitation. The warrant necessarily would imply conduct either criminal or out of compliance with an asserted governing standard. Of course, the force behind the warrant argument, welcome to the one asserting it, is the fact that it would have to rest upon probable cause, and probable cause in the welfare context, as Mrs. James concedes, requires

> more than the mere need of the caseworker to see the child in the home and to have assurance that the child is there and is receiving the benefit of the aid that has been authorized for it. In this setting the warrant argument is out of place.

400 U.S. at 323-24.

A. There Is No Conflict Among The Courts of Appeal.

Petitioners' assertion that this Court should grant certiorari because *Wyman*'s status has created a conflict among the courts of appeals is mistaken. *Wyman* was decided in 1971. In the thirty-six years since the *Wyman* decision, only one other court of appeals has applied *Wyman* in the context of a home visit program used to confirm eligibility for government benefits. Twelve years ago, the Seventh Circuit upheld the home visit program at issue in that case on the same grounds as the Ninth Circuit upheld the home visit program in this case -- the home visits are not Fourth Amendment searches and even if they were, they are reasonable. *S.L. v. Whitburn*, 67 F.3d 1299.[8]

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[8] Petitioners also cite a twenty-eight year old decision from a district judge in Minnesota. *Reyes v. Edmunds*, 472 F. Supp. 1218, 1224 (D. Minn. 1979). In *Reyes*, the district judge stated that "[t]he majority opinion in *Wyman v. James* is not without conceptual problems, and, in view of the vigorous, persuasive three-judge dissenting opinions, the holding must be restricted

(Continued on following page)

Petitioners' contention that the Ninth Circuit's decision in this case conflicts with the Seventh Circuit's decision in *Whitburn* is simply wrong. In *Whitburn*, the plaintiffs challenged a home visit program instituted by Milwaukee County, in Wisconsin. In Milwaukee County, a "caseworker" reviews a completed application for welfare benefits and interviews the applicant. "The application is then subject to verification to ensure that the information provided is accurate and that the applicant is eligible for public assistance." *Id.* at 1302. "[I]f the information provided to a caseworker is insufficient to verify eligibility, or if

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to the boundaries imposed by the facts to avoid glaring inconsistency with prior search and seizure cases." 472 F. Supp. at 1224 (citing *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. Seattle*, 387 U.S. 541 (1967)).

It is clear from the district judge's statement that he believed the dissent, and not the majority, had correctly decided *Wyman* and he declined to follow this Court's decision. District judges, however, do not have the authority to ignore binding Supreme Court precedent. *Hubbard v. United States*, 514 U.S. 695, 713 n.13 (1995).

Moreover, the Court in *Wyman* distinguished both *Camara* and *See* finding no "glaring inconsistencies" with its holding. 400 U.S. at 325. The *Wyman* court held that *Camara* and *See* were not inconsistent because Mrs. James was not prosecuted for refusing to allow the home visit, her welfare benefits were merely terminated. *Id.*

Petitioners state that "[t]he Minnesota federal district also has invalidated a welfare home-visit program under the Fourth Amendment, using the same reasoning as the Seventh Circuit in *Whitburn*." (Petition, at 17-18, n.12.) In *Whitburn*, however, the Seventh Circuit ***upheld*** the home visit program against the Fourth Amendment challenge.

a caseworker believes that an applicant may not be eligible for benefits, then the case is designated for verification." *Id.* Verification is done by an "investigative service" hired by the County. Verification could include a home visit.

Milwaukee County does not obtain a search warrant for the home visits. The home visits are conducted between 8:00 a.m. and 8:00 p.m. (normally during business hours except under special circumstances). "The County does not contact the applicant to schedule the exact date or approximate time of the visit." *Id.* The field representative asks for permission to enter the residence and cannot enter the residence unless the applicant gives permission. Once inside, the field representative can note anything in plain view and pertinent to eligibility. Field representatives can "ask for permission to inspect closets, cabinets, attics, basements, garages, etc., but they are forbidden to inspect these areas without the resident's consent." *Id.*

The Seventh Circuit held, among other things, that the home visits did not violate the applicants' Fourth Amendment rights. The court initially held that it was bound by *Wyman* and the home visits were not searches for the same reasons articulated by this Court in *Wyman*. *Id.* at 1307 ("*Wyman* dictates that the home visits at issue are not searches within the meaning of the Fourth Amendment.") Further, the Seventh Circuit found that the home visits were not unreasonable, even if they were searches. The Seventh Circuit emphasized that while not all of the

factors discussed by the Court in *Wyman* were present in *Whitburn*, most of the factors were present and under *Wyman* the home visits were not unreasonable. *Id.* at 1308-09. Finally, the Seventh Circuit applied this Court's "special needs" cases and indicated that those cases supported its determination that if the home visits were searches, they are reasonable, and no warrant was required. *Id.* at 1310.

Petitioners assert that the Seventh Circuit upheld the home visit program in *Whitburn* "only on the ground that the home inspections were not mandatory, in that . . . 'benefits are not denied or cut off because the applicant has refused to allow the home visit.'" (Petition, at 17) (*quoting Whitburn*, 67 F.3d at 1307). Since the Seventh Circuit expressly stated that it was bound by *Wyman* and followed that decision, it is clear that it would not have struck down the home visit program if benefits were denied or cut off because an applicant refused to allow a home visit. This is true because in *Wyman* the Court explained that "[t]he visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be." 400 U.S. at 317-18. The Court therefore concluded that even if aid is denied for failure to consent to a home visit, the home visit does not violate the Fourth Amendment.

In *Whitburn*, the Seventh Circuit obviously did not conclude, contrary to *Wyman*, that a home visit

would violate the Fourth Amendment if benefits were denied as a result of an applicant's refusal to allow a home visit. The Seventh Circuit merely noted that this was an additional factor proving that the program did not violate the Fourth Amendment. The Ninth Circuit did not believe that *Whitburn* conflicted with its decision – it relied on *Whitburn* in upholding the County's home visit program. *Sanchez*, 464 F.3d at 921 n.6.

Accordingly, this Court does not need to expend its limited resources to address an area of Fourth Amendment law that rarely arises and where the courts of appeals have reached consistent decisions.

B. Searches Made For Purposes Of Investigating Child Abuse Are Different From The Project 100% Home Visits.

Recognizing that (a) only two courts of appeals decisions have applied *Wyman* in the context of home visits used to confirm eligibility for welfare benefits in the past thirty-six years and (b) that the two courts of appeals decisions are consistent, petitioners try to create a conflict by lumping all "home entries by government officials in the social-services context" together. This approach is unavailing.

Petitioners cite six cases in support of their "conflict" argument that all involve entry into the home for the purpose of investigating allegations of child abuse or to remove a child from the custody of his or her guardian. In none of the cases where

Fourth Amendment violations were found was entry into the home done with consent. Police officers accompanied the social workers in five of the cases. *Calabretta v. Floyd*, 189 F.3d 808, 811 (9th Cir. 1999); *Good v. Dauphin County Social Services*, 891 F.2d 1087, 1089 (3d Cir. 1989); *Lenz v. Winburn*, 51 F.3d 1540, 1543 (11th Cir. 1995); *Roska v. Peterson*, 328 F.3d 1230, 1238 (10th Cir. 2003); *Wildauer v. Rederick County*, 993 F.2d 369, 371 (4th Cir. 1993). In two of the cases the children were strip searched. *Calabretta*, 189 F.3d at 811-12; *Roe v. Texas Department of Protective and Regulatory Services*, 299 F.3d 395, 399 (9th Cir. 2002). In one case a child was strip searched and a body cavity search was also performed. *Roe*, 299 F.3d at 399. In only three of the cases did the courts of appeals even cite *Wyman*. *Roe*, 299 F.3d at 405-06; *Calabretta*, 189 F.3d at 816; *Wildauer*, 993 F.2d at 372.

None of the cited cases involved a systematic program applied to all applicants to confirm eligibility for welfare benefits. Rather, these cases involve entry into the home for purposes of investigating individualized allegations of child abuse. Therefore, these cases are readily distinguishable from *Wyman* and the principles announced in *Wyman* are not applicable.

For instance, in *Roska*, the Tenth Circuit recognized that in "special needs" cases "the nature of the need addressed makes particularized suspicion impossible or otherwise renders the warrant requirement impractical." 328 F.3d at 1241. However,

the Court noted that "individualized suspicion is at heart of a removal of a child from a home, distinguishing the instant case from the various drug testing cases [involving 'special needs'] that have been addressed by the Court." *Id.* at 1242. Similarly, in *Roe*, the Fifth Circuit distinguished *Wyman* on the ground that "[a]*ll* AFDC recipients had to endure visitation; the government did not single out individual recipients based on potential criminal liability." 299 F.3d at 405 (emphasis in original).[9]

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[9] In *Calabretta*, Judge Kleinfeld, writing for the Ninth Circuit, stated that *Wyman* "holds that the state may terminate welfare where a mother refuses to allow a social worker to visit her home to see whether the welfare money is being used in the best interests of the child for whom it is being paid." 189 F. 3d at 816. Judge Kleinfeld distinguished *Wyman* because in that case entry into the home was not "forced or compelled" whereas in *Calabretta* it was. In this case, the Ninth Circuit correctly recognized that "[a]s in *Wyman*, the home visits are conducted with the applicant's consent, and if consent is denied, the visit will not occur." *Sanchez*, 464 F.3d at 921.

Petitioners state that in *Calabretta* the Ninth Circuit concluded that, contrary to *Wyman*, entry into the home is not "consensual" if refusal to consent to the entry results in the loss of benefits. (Petition, at 19.) This statement is false. In *Calabretta*, the Ninth Circuit specifically recognized that under *Wyman*, "the state may terminate welfare where a mother refuses to allow a social worker to visit her home. . . . " 189 F.3d at 816.

Further, Judge Kleinfeld was in the panel majority in this case and felt no need to even mention the *Calabretta* decision. Thus, there is obviously no conflict within the Ninth Circuit's opinions on these Fourth Amendment issues as petitioners assert.

Systematic home visits for the purpose of confirming eligibility for benefits fit squarely within the rubric of this Court's special needs cases and *Wyman* itself. Cases involving individualized suspicion of child abuse are different from the type of home visits considered in *Wyman* where there was no individualized suspicion of wrongdoing. Thus, granting certiorari in this case would not assist the lower courts in determining the proper standards that apply to home searches done for the purpose of investigating alleged child abuse.

C. The Status Of *Wyman's* Initial Holding Does Not Warrant Consideration By This Court.

Petitioners also assert that certiorari should be granted because it is uncertain from subsequent decisions of this Court whether the *Wyman* court's initial holding that the home visits were not searches within the meaning of the Fourth Amendment is still good law. Since only two courts of appeals decisions in the past thirty-six years have addressed this particular issue, it is hardly a pressing one that requires this Court's attention.

This is particularly true in light of *Wyman's* alternative holding that even if the home visits were Fourth Amendment searches, the searches were reasonable. The Court employed an analysis that is very similar to "special needs" test that this Court has subsequently employed. In *Wyman*, the Court explained that the home visit "is not a criminal

investigation, does not equate with a criminal investigation, and . . . is not in aid of any criminal proceeding." 400 U.S. at 323. The Court also discussed in detail why requiring a government entity to obtain a warrant for a welfare home visit would be impractical. *Id.* at 323-24. Thus, *Wyman* fits within this Court's later developed special needs cases. *Griffin*, 483 U.S. at 873 ("Although we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be), we have permitted exceptions when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.") (citations and internal quotation marks omitted). Indeed, lower courts have cited *Wyman* as being a special needs case. *Roe*, 299 F.3d at 405 (analyzing *Wyman* as one of "the Court's two cases applying the 'special needs' doctrine to investigative home searches"); *McCabe v. Life-Line Ambulance Serv.*, 77 F.3d 540, 545 (1st Cir. 1996).

A court considering the constitutionality of a home visit program is highly unlikely to end its analysis by concluding that a home visit is not a search within the meaning of the Fourth Amendment. Rather, a court will do what the Ninth Circuit did here and what the Seventh Circuit did in *Whitburn* – consider whether the home visits are reasonable if they are Fourth Amendment searches. When resolving this question, courts will also do what the Ninth Circuit did here and what the Seventh Circuit did in

Whitburn – consider whether the searches qualify under this Court's special needs cases. Accordingly, even if the portion of the *Wyman* decision holding that home visits do not implicate the Fourth Amendment is not good law, there is virtually no chance that a lower court will reach a conclusion that is inconsistent with *Wyman* or the Court's other Fourth Amendment cases.

II

THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT THIS CASE IS GOVERNED BY *WYMAN*

Finally, petitioners ask the Court to grant certiorari because they assert that the County's home visits are distinguishable from the home visits at issue in *Wyman*. Since the Ninth Circuit's decision does not conflict with *Wyman*, this not an appropriate ground for granting certiorari. Rule 10 of the Rules of the United States Supreme Court. Indeed, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." *Id.* Moreover, the premise of petitioners' argument is wrong. The County's home visits are not distinguishable from the home visits that the Court considered in *Wyman*.

A. The Purpose Of The Home Visits Is To Confirm Benefit Eligibility.

Petitioners assert that "[t]he express purpose of [the home visits] is to uncover evidence of fraud in connection with the welfare application. In addition, should they find it, 'the investigators are required to report evidence of potential criminal wrongdoing for further investigation and prosecution.'" (Petition, at 5) (citations omitted). Petitioners assert that this "fact" distinguishes this case from *Wyman*. Petitioners are incorrect because they have misstated the record.

The purpose of the County's home visit program is to confirm that applicants are eligible for benefits, not to detect fraud. (ER 81 Ex. 7 at 19:8-11 (Crosby Depo.)). Moreover, the record shows that if an investigator believes that an applicant has committed welfare fraud in connection with the application, the investigator will ***not*** refer the matter for criminal investigation or prosecution. (ER 81 Ex. 43 at 89:4-10 (Reid Depo.)). Indeed, it is undisputed that no applicant has been prosecuted for welfare fraud based upon anything observed or discovered during a home visit that contradicted information provided by the applicant in the application or otherwise. (ER 81 Ex. 43 at 89:4-10, 157:1-4, 177:12-25, 191:20-192:6 (Reid Depo.)). The Ninth Circuit correctly determined that "[t]here is no evidence . . . that applicants have ever been prosecuted for welfare fraud as a result of inconsistencies discovered during the home visit, ***supporting a conclusion that the visits are***

intended, and in fact used, only as an eligibility verification tool." *Sanchez*, 464 F.3d at 924 n.12 (emphasis added).

It is true that if an investigator observes illegal substances such as drugs during a home visit, she may report this to the Child Protective Services, who will take whatever action they deem appropriate. (ER 81 Ex. 41 at 106:22-107:1). Similarly, if the home visit reveals information that an applicant may have received CalWORKs benefits in the past for which the applicant was not entitled, this information may lead to a subsequent investigation. (ER 81 Ex. 42 at 75:18-76:5 (Reid Depo.), Ex. 42 at 105:4-12 (Duvall Depo.), Ex. 42 at 115:13-19 (Crosby Depo.)).

However, this does not mean that the purpose of the home visits is to aid in criminal enforcement. As this Court recognized in *Wyman*, "[i]f the visitation serves to discourage misrepresentation or fraud, such a byproduct of that visit does not impress upon the visit itself a dominant criminal investigative aspect." 400 U.S. at 323. Similarly, the Court stated that "[i]f the visit should, by chance, lead to the discovery of fraud and a criminal prosecution should follow . . . that is a routine and expected fact of life and a consequence no greater than that which necessarily ensues upon any other discovery by a citizen of criminal conduct." *Id.* (footnote omitted).

Accordingly, the purpose of the County's home visit program is to confirm eligibility for benefits, not

to investigate fraud or other alleged criminal violations. Therefore, *Wyman* cannot be distinguished on this ground.

B. The Home Visits Are Not Coerced.

Petitioners also argue that unlike *Wyman*, the home visits at issue here are coerced. According to petitioners, "it is difficult to imagine a more coercive situation than the one created by Project 100%" because if consent is not given for a home visit, the applicant will not receive benefits. (Petition, at 19.) Petitioners are simply wrong. As noted above, in *Wyman*, this Court stated that "the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. ***The aid then never begins or merely ceases, as the case may be.***" 400 U.S. at 317-18) (emphasis added).

The fact that benefits will not begin if an applicant does not consent to a home visit does not make the home visit coerced in violation of *Wyman*.

C. The Investigators Are Not Police Or Uniformed Authority.

Petitioners also attempt to distinguish *Wyman* on the ground that the individuals making the home visits in that case were caseworkers, while plaintiffs

characterize the County's investigators as "sworn peace officers" and "law-enforcement officers."

One factor in this Court's holding in *Wyman* that the home visits were reasonable searches (the Court assumed for the sake of argument that they were searches) was that the individuals conducting the home visits were not "police or uniformed authority." *Id.* at 322. The fact that that the home visits were made by caseworkers, as opposed to some other non-police, non-uniformed authority, was not germane.

The County investigators, like the caseworkers in *Wyman*, have virtually none of the trappings, powers or job responsibilities as traditional law enforcement officers or police. The investigators do not wear uniforms, do not carry weapons of any kind, and do not have the power to arrest anyone because they have not been given that power by the D.A.'s Office. (ER 81 Ex. 10 at 1 (memo), Ex. 10 at 15:12-15 (Crosby Depo.), Ex. 10 at 58:17-19 (Bogard Depo.); ER 79 at 2, ¶ 6 (Crosby Decl.)).

Indeed, this Court rejected the distinction petitioners advance in *New York v. Burger*, 482 U.S. 691 (1987). In that case, the Court upheld the warrantless inspection of a vehicle-dismantling business by uniformed police officers, finding no significance to the fact that police officers, not administrative agents, conducted the inspection:

> [W]e fail to see any constitutional significance in the fact that police officers, rather than "administrative" agents, are permitted

> to conduct the [] inspection. The significance respondent alleges lies in the role of police officers as enforcers of the penal laws and in the officers' power to arrest for offenses other than violations of the administrative scheme. It is, however, important to note that state police officers, like those in New York, have numerous duties in addition to those associated with traditional police work. . . . So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself.

Id. at 717.

For these reasons, *Wyman* cannot be distinguished on the ground that the County uses investigators to perform the home visits.

D. Rehabilitation Was Not The Primary Purpose Of The Home Visits In *Wyman*.

Next, petitioners assert that the home visits at issue in *Wyman* are different from the home visits in this case because the *Wyman* home visits were purely rehabilitative and involved only "in-home counseling by a social worker at the kitchen table or in the living room." (Petition, at 18.) It is apparent, however, that the primary purpose of the home visits at issue in *Wyman* was to confirm eligibility for benefits – not to provide "rehabilitation." In the lower court, New York asserted that "the home visit is neither a search nor a

seizure, but is merely ***designed to verify information as to eligibility for public assistance*** and is thus reasonably related to a valid governmental policy. . . . " *James v. Goldberg*, 303 F. Supp. 935 at 939 (1969) (emphasis added). This is the same primary purpose as the Project 100% home visits. New York also argued that "since the receipt of public assistance is a privilege, plaintiff is obligated to provide necessary information so that this privilege can be recognized and implemented. . . . " *Id.* (citation and footnote omitted).

The Court also noted that New York had a "paramount interest and concern in seeing and assuring that the intended and proper objects of that tax-produced assistance are the ones who benefit from the aid it dispenses." *Wyman,* 400 U.S. at 319. The Court indicated that the public had a strong interest in knowing that its funds are being used properly. The Court likened the home visits to the situation "where an Internal Revenue agent, in making a routine civil audit of a taxpayer's income tax return, asks that the taxpayer produce for the agent's review some proof of a deduction the taxpayer has asserted to his benefit in the computation of his tax." *Id.* at 324. These statements relate to the eligibility confirmation component of the home visits and demonstrate that this Court understood that this was their primary purpose.

Petitioners' contention is also inconsistent with how the dissent viewed New York's home visit program. According to the dissent "the welfare visit is

not some sort of purely benevolent inspection." *Id.* at 339 (Brennan, J., dissenting). Justice Brennan also noted that "[t]ime and again, in briefs and at oral argument, appellants emphasized the need to enter AFDC homes to guard against welfare fraud and child abuse, both of which are felonies." *Id.* (footnote omitted). New York also "emphasized the importance of the visit to provide evidence leading to civil forfeitures including elimination of benefits and loss of child custody." *Id.* at 340.

Thus, both the home visits at issue in *Wyman* and the Project 100% home visits share the same primary purpose – to confirm that the applicant is eligible for welfare benefits. Thus, the Ninth Circuit properly concluded that "on *Wyman's* first holding [that the home visits are not Fourth Amendment searches], there is no greater showing of rehabilitative purpose than there is in this case." *Sanchez*, 464 F.3d at 921 n.6. "[T]he search in *Wyman* had no more of a rehabilitative purpose than the search here." *Id.* at n.7.

The Ninth Circuit also properly concluded that "whether the home visits serve a rehabilitative purpose is not the determinative inquiry under *Wyman*. . . . [T]his factor is relevant insofar as it indicates that the home visits are not intended as searches conducted in furtherance of a criminal investigation." *Id.* In this case, the home visits are used to confirm eligibility for benefits, not to further a criminal investigation.

For these reasons, petitioners' attempt to distinguish *Wyman* on this ground fails.

E. The Home Visits Are Needed To Confirm Benefit Eligibility.

Citing a law review article, petitioners contend that "[e]xperience shows that computer-matching systems are both more likely to uncover fraud and far less intrusive on personal privacy." (Petition, at 19.) Thus, petitioners contend that the home visits are not needed. However, petitioners own experts admitted that the available electronic databases are often out-of-date and have incomplete information. (Supp. ER Ex. 2 at 20:13-25, 21:24-22:24, 23:23-25:4, 25:24-26:7, 27:8-11, 29:2-31:13 (Shapiro Depo.)).[10] Thus, computer-matching systems are not reliable substitutes for home visits.

Further, in *Wyman*, the Supreme Court stressed that secondary sources such as leases, birth certificates, or interviews with school personnel, "might be helpful, [but] they would not always assure verification of actual residence or of actual physical presence in the home, which are requisites for AFDC benefits. . . ." 400 U.S. at 322 (footnote omitted). The admissions of plaintiffs' experts likewise establish that computer databases would not always assure actual residence or physical presence in the home.

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[10] "Supp. ER" refers to the Supplemental Excerpts of Record the County filed in the Ninth Circuit.

Moreover, this Court "has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because the logic of such elaborate ***less-restrictive-alternative*** arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *Board Of Education v. Earls*, 536 U.S. 822, 837 (2002) (emphasis added; internal citations, quotation marks omitted).

For these reasons, *Wyman* cannot be distinguished on this ground.

F. No Serious Welfare Fraud Problem Is Necessary For The Existence Of A Home Visits Program.

Petitioners also assert that a "serious welfare-fraud problem" is needed to justify the County's home visit program. (Petition, at 19.) However, no case establishes that a serious welfare fraud problem is needed before a government may implement a home visit program. There was no evidence introduced in *Wyman* indicating that New York had a serious welfare fraud problem. Nonetheless, the home visits were upheld in that case.

The evidence does establish, however, that the home visit program has been successful. For the roughly five-year period before and after Project 100% was implemented, the overall denial rate increased from 40.6% to 47.7%. (ER 92 at 2, ¶ 8 (Vukotich Decl.)). Seven percent is a significant increase. When

withdrawals[11] are added to denials the increase is even more dramatic, from 47.1% to 58.4% – more than 11%. (*Id.*)

Moreover, statistics comparing denial rates before and after Project 100% will never tell the whole story because they do not capture the program's deterrent effect. People who are not eligible for CalWORKs benefits and decide not to apply for those benefits after learning of Project 100% will not be reflected in those statistics. Thus, the public benefit of Project 100% cannot be demonstrated by statistics alone.

Indeed, the public benefits even if the home visit reveals that an applicant is eligible for CalWORKs benefits. The taxpayers are entitled to assurance that their money is being well spent and can take comfort in the fact that only those who are eligible for benefits are receiving them.

The County's home visits program has been successful and no serious welfare fraud problem is needed to justify a home visit program.

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[11] When ineligible applicants learn of the home visit at the initial interview with the ET, they may choose to withdraw their application. (ER 92 at 2, ¶ 9 (Vukotich Decl.)).

G. The Ninth Circuit Did Not Endorse A Home Visit Program For Taxpayers.

Based on Judge Fisher's dissenting opinion, petitioners assert that the Ninth Circuit's interpretation of *Wyman* could be used to justify visits to the homes of other recipients of government aid programs such as Medicare or Social Security. In addition, petitioners assert that, "the reading of *Wyman* endorsed by the panel below would permit agents of the Internal Revenue Service to enter and search the home of any person claiming a dependent as a tax deduction, in order to verify the claim." (Petition, at 20.) Petitioners are wrong. Under the CalWORKs program "eligibility depends, in part, upon a person's physical residence in the state and actual presence at the place designated as their residence. . . . " *Sanchez*, 464 F.3d at 927. Further, an applicant may not be eligible for benefits if a claimed "absent" parent is actually living in the home. (ER 81 Ex. 8 (Eligibility Factors)).

For programs such as Medicare and Social Security, eligibility depends entirely on age and prior work credits.[12] There would be no need and therefore no justification for home visits to determine eligibility for those benefit programs because, unlike CalWORKs benefits, presence in a particular state or the

[12] Judge Fisher also mentioned veteran's benefits in his dissent. Eligibility for such benefits depends on prior military service, not physical presence in a state.

United States is not a requirement to receive those benefits. Similarly, it is not necessary for a dependent to reside in the home for a person to able to claim the dependent as a tax deduction. Thus, there would be no reason to use a home visit to confirm that a dependent deduction was properly claimed.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ or Certiorari should be denied.

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Respectfully submitted,

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